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Supreme Court of the United States

(OCTOBER TERM, 1944)

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
a corporation,
Appellant,

VERSUS

JESS G. READ, the Insurance Commissioner of the State of Oklahoma et al.,
Appellees.

REPLY BRIEF OF APPELLANT

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April, 1945.

UTTERBACK TYPESETTING CO., 13 S. Walker, Oklahoma City 4, Okla.

TABLE OF CASES

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I.

Reply to First Proposition of Appellees.

The first proposition, stated on pages 4-12 of appellees' answer brief, pertains to matters of local practice. We fail to understand the purpose of that proposition, since their failure to comply with Rule 12, paragraph 3, of this Court prevents this from being treated as a motion to dismiss, and since they admit it is a matter which, never having been raised heretofore, cannot now be considered. We feel it our duty, however, to reply to it.

An analysis of the whole of the decision of the Oklahoma Supreme Court (R. 48-68) shows that that Court

based its decision against appellant solely on the Court's answer to the Federal question. Under the view which it took of the pleadings, its decision of that point was essential to a disposition of the case.

But appellees assert in this proposition that under a construction of the pleadings now offered for the first time, the judgment appealed from is correct, irrespective of the Federal question.

In the first place, any controversy relating to the pleadings and practice in Oklahoma is purely a matter of local law and beyond the jurisdiction assumed by this Court. For example, in *Buena Vista County* v. *Iowa Falls etc., R. R. Co.*, 112 U. S. 167-177, 28 L. Ed. 680, this Court said:

> "Other errors are assigned upon the record, relating, however, to matters of pleading and practice under the laws of the State, which, as they involve no Federal question, are not proper for our consideration."

See, also, *Thorington* v. *The City Council of Montgomery*, 147 U. S. 490, 495, 37 L. Ed. 252; *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 75 L. Ed. 482.

Furthermore, whether there is properly a Federal question in the case or not, is conclusively settled by the assumption of the state court that there is. In *Miedreich* v. *Lauenstein*, 232 U. S. 236, 58 L. Ed. 584, this Court said:

> "Where a state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this Court will regard the question as duly made."

See, also, *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 76 L. Ed. 146; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. Ed. 565; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123-134, 58 L. Ed. 1245; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591; *Nickey* v. *Mississippi*, 292 U. S. 393, 78 L. Ed. 1323; *Whitfield* v. *Ohio*, 297 U. S. 431, 80 L. Ed. 778; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392, 71 L. Ed. 1115; *Cissna* v. *Tennessee*, 246 U. S. 289, 62 L. Ed. 720; *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S. 548, 66 L. Ed. 1056.

Appellees' analysis is incorrect, but the fact that there might be lurking in the record some point of local law broad enough to sustain the judgment, avails nothing where the state court based its decision solely upon the Federal question.

The rule is stated in *Grayson* v. *Harris*, 267 U. S. 352-358, 69 L. Ed. 652, as follows:

> "The rule that, when the decision of a state court may rest upon a non-Federal ground adequate to support it, this Court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the state court, but was not."

See, also, *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 43 L. Ed. 823; *St. Louis I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179; *International Steel &*

Iron Co. v. *National Surety Co.*, 297 U. S. 657, 80 L. Ed. 961; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 82 L. Ed. 685.

The foregoing discussion is necessarily brief because of the lateness of this thrust by appellees, but we earnestly urge to this Court that, if it entertain any serious doubt as to its jurisdiction, or as to the propriety of its disposing of the Federal question herein, we be allowed opportunity to answer this proposition adequately, in line with the spirit and intent of this Court's Rule 7, paragraph 3.

II.

Reply to Second, Third and Fourth Propositions of Appellees.

Although appellees on pages 2 and 3 of their brief concede that the pleadings, and the brief of appellees in the Oklahoma Supreme Court, admit that the tax law in question discriminates against foreign insurance companies and produces revenue in excess of the cost of administration, they say that such pleadings and brief do not admit that said law was enacted for a "revenue producing purpose."

That said law was enacted for revenue-producing purposes is alleged in appellant's petition (R. 29) and is further established by the operation and effect of said law as applied and enforced by the State. It is made clear by the quotations from the opinion of the Oklahoma Supreme Court appearing on pages 8 and 9 of brief of ap-

pellant, that said law operates and applies each year after the license is issued and in effect exacts a tax and not a fee. As said by this Court in *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U. S. 350, at page 362, 59 L. Ed. 265, 271:

> "The controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

In *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 71 L. Ed. 372, this Court, after quoting with approval on page 510 of its opinion the foregoing passage from the Arkansas case, said on page 515:

> "Tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment."

On pages 19 to 22 of appellees' brief the requirements made of foreign insurance companies under administrative interpretation and practice are set forth. All the requirements except (e) on pages 19 and 21 operate and apply as valid conditions precedent as defined in the *Hanover* case. But requirement (e) applies the admittedly discriminatory gross premium tax on business done after such corporation is received into the State, and after the issuance of each renewal license. The tax is paid at the end of each license year for the past. Requirement (e) therefore requires the foreign corporation as a condition of its entry into the State to agree to submit to discriminatory taxation. It is therefore required to waive its rights to equal protection of the

laws guaranteed to it under the Fourteenth Amendment to the Federal Constitution. The State does not have that power, as we have shown on pages 21-23 of brief of appellant.

As this Court has stated in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 533, 66 L. Ed. 352:

> "The sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

In the *Terral* case the Court further says:

> "It follows that the case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Mut. L. Ins. Co.* v. *Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, must be considered as overruled and that the views of the minority judges in those cases have become the law of this Court."

The dissenting opinion (now the law of this Court) in the case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, says:

> "Though a state may have the power (if it sees fit to subject its citizens to the inconvenience) of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering and may manifest a spirit of unfriendliness toward sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to

the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other."

In the case of *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 258, 50 L. Ed. 1013, the Court had for review a case turning upon the right of a state court, as a condition of admitting a foreign corporation, to prescribe that the licensed corporation shall not remove cases to the Federal Court. The minority opinion (now the law of this Court) says:

> "In all the cases in which this Court has considered the subject of the granting by a State to foreign corporations of its consent to the transaction of business in the State, it has uniformly asserted that *no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States*" (p. 261).

The same opinion further says:

> "The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a state is at war with that instrument, and if adopted or sanctioned by all of the states would nullify the supreme law of the land in some of its most essential provisions" (p. 262).

It is also said in the opinion:

> "If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in

the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation, 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws;' and so on through the category of rights secured by the Constitution, and deemed essential to the protection of people and corporations living under our institutions" (p. 267).

On page 23 of the brief of appellees it is stated that the *Philadelphia Fire Association* case pointed out the way to make an annual gross premium tax constitutional. That case is discussed on pages 35-39 of the brief of appellant. It is important to note in that case it is held that the state has the power to change the conditions of admission at any time, *for the future,* and to impose a new or further tax, *as a license fee.* We will hereinafter show that later cases hold that the State's power so to do is not unlimited. However, the State of Oklahoma had not seen fit to follow

the way pointed out in that case, prior to the recent amendment of the Oklahoma gross premium tax law which was enacted in February, 1945. Illinois saw fit to do so by the 1919 gross premium tax law which was incidentally involved in the *Hanover* case as is shown on pages 29-32 of the brief of appellant.

The Oklahoma Supreme Court in this case has held that the Oklahoma gross premium tax here in question operates in the manner as appears in the quotations from its opinion on pages 8 and 9 of the brief of appellant. We have discussed the operation of that tax on pages 23-24 of brief of appellant.

Appellees concede (Brief, pp. 13-14) that this Court is concluded by the decision of the Oklahoma Supreme Court on the question of construction, as pointed out on page 17 of brief of appellant. There it is shown that the controlling test of constitutionality is not in the name given the tax by the State, but is to be found in the operation and effect of the law as applied and enforced by the State. And we have further shown on page 46 of brief of appellant that where the State, as Oklahoma has done, makes the tax laws apply after the foreign corporation is received into the State, they are to be considered as enacted for the purpose of raising revenue and must conform to the equal protection clause of the Fourteenth Amendment. Appellees obviously are attaching controlling importance to name and characterization by their reference on pages 16, 25, and 26 of brief of appellees to gross premium tax laws of other states.

On page 27 of their brief, appellees quote from the case of *New York Life Ins. Co.* v. *Bd. of Com'rs of Oklahoma Co.*, 155 Okla. 247, 9 Pac. (2d) 936. Following the passages quoted in appellees' brief, that Court further said:

> "The state has the power to impose these conditions, which are subject to no constitutional limitation or inhibition, except that such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with the Federal Constitution."

That case involved only the question whether the gross premium tax was in lieu of *ad valorem* taxes and the Court held it was not.

On page 30 of the brief of appellees the holding of the Oklahoma Supreme Court that it is not essential that a privilege tax be paid before the exercise of the privilege, is emphasized. Our answer appears on pages 28 and 29 of brief of appellant.

On page 31 of brief of appellees reference is made to the discussion of the *Hanover* case by the Oklahoma Supreme Court, and then appellees say:

> "* * * but as said Court's interpretation of the meaning of the Illinois law involved therein is not binding on this Court, appellees will not burden this subhead of our brief with further reference thereto."

The Oklahoma Supreme Court, in attempting to distinguish the *Hanover* case from the case at bar, said that the Illinois gross premium tax and the Oklahoma gross premium tax are "almost the same." It is obvious that

it failed to observe the operation of the said Illinois law. We gave careful consideration to the difference in the operation of the gross premium tax laws of Oklahoma and Illinois in our discussion on pages 23-24 and 27-32 of brief of appellent. That discussion goes to the controlling test, which neither the Oklahoma Supreme Court nor the appellees appear to consider as important.

That the appellees are considering the name and character of the tax, rather than its operation, as controlling is borne out in their discussion of the *Hanover* case on pages 33-39 of brief of appellees. Without any observation regarding the operation of the 1919 gross premium tax law of Illinois, although its pertinent provisions are set forth on pages xiv-xv of the appendix to the brief of appellant, appellees on pages 33 and 37 of brief of appellees refer to said law as being essentially the same as the law involved here.

It should be remembered, as we pointed out in our discussion of the characterization of taxes, on pages 14-20 of brief of appellant, that when the *Hanover* case was decided the net receipts tax there held invalid was characterized by the State Court as a privilege tax. The 1919 gross premium tax of Illinois was also a privilege tax. But the invalid net receipts tax of Illinois applied a discriminatory tax burden each year during the period of the license, as does the Oklahoma gross premium tax here, while the gross premium tax under the 1919 law of Illinois is exacted and paid each year as a fee for the future before the license is issued.

On page 39 of their brief appellees attempt to distinguish the *Shaffer Oil & Refining Company* case by inferring that the foreign corporations there were doing business under an "indefinite license." The Oklahoma license fee statute enacted in 1927 was there in question. The decision points out that the laws since 1910 required foreign corporations to procure a license annually, and that the foreign corporations in the case had acquired tangible and intangible property of great value in the State. That case cited and relied upon the *Hanover* and *Greene* cases and recognized and enforced the limitation to the power of the State of Oklahoma against the exaction of a discriminatory license fee, where valuable rights acquired over a long period of time were affected.

Appellees further evade the controlling test which is to be found in the operation of the laws in question, and misconstrue appellant's contentions in the discussion appearing on pages 40-45 of their brief. Appellees say on page 41:

> "For example, if said contention is sound, a state law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of $1,000.00 on a foreign corporation for the right or privilege of entering the state and doing business therein *for a period of either one or twenty years,* if said law *provides* that one-half of said fee or tax is payable on or prior to the commencement of said period and the other one-half payable ten days thereafter."

It may be observed therefrom that *before* the foreign corporation is admitted into the State the license fee of $1,000.00 is established. It is capable of being paid *before* the license is issued. Its determination is not dependent upon business done *after* admission of the foreign company into the State. It is not a tax on business done, and it is not exacted after the privilege of doing business has been exercised. It is strictly a *fee* for the future, and is distinguishable from the *tax* for the past in question here.

The essence of appellees' contention (Brief, pp. 42-43) is that the discriminatory tax in question is "assumed" by appellant as a "condition precedent" to the issuance of the license. Since the tax is "assumed," it necessarily follows that appellant *agrees* as a "condition precedent" to the issuance of its license that it will pay a discriminatory tax on business done after entry.

The discriminatory tax operates and applies after admission and cannot be paid as a "condition precedent," so the State exacts the *agreement* as a condition of entry. That agreement constitutes a waiver by appellant of its rights to the equal protection of the laws. The State does not have that power according to the authorities first cited under this subdivision, and as said in the *Hanover* case (p. 507):

> "* * * the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed."

Regarding the quotation from the *New York Life Insurance Company* case on page 44 of brief of appellees, we agree that a gross premium tax is an equitable mode of taxation in the absence of discrimination against foreign insurance companies in favor of competing domestic insurance companies.

Appellant contends that according to the construction of the tax by the Oklahoma Supreme Court, as revealed by the quotations on pages 8-9 of brief of appellant, it is plain that compliance therewith is not a condition precedent to permission to do business in Oklahoma. See pages 24-33 of the brief of appellant. However, if this Court should reach a contrary conclusion, we nevertheless suggest that the State's power to change or revise the conditions upon which business is permitted is not unlimited.

Under the regulatory powers of the State, licenses are issued to both domestic and foreign insurance companies for one year at a time, expiring on the last day of February in each year, and are renewed from year to year. Appellant qualified and was received into the State in October, 1919, at which time it paid an entrance fee of $200.00 (R. 27-28). At that time the rate of the gross premium tax was 2%. Thereafter appellant has continued to transact business in Oklahoma by permission of the State under a renewal of its license each year. It has paid the annual license fee of $200.00 and the annual 2% gross premium tax (R. 27-28). Appellant has through many years, as alleged in its petition (R. 28), built up good will and established a successful and valuable life insurance business

within the State of Oklahoma. It has assembled at great expense, information and records respecting its policyholders and business within said State, the value of all of which would be destroyed if appellant were to be excluded from the State by a denial of the equal protection of the laws.

Then effective April 25, 1941, and after appellant had been a *quasi* citizen of Oklahoma for a period of more than 22 years and had established its business obligations and liabilities on the basis of the tax burdens above set forth, the rate of the gross premium tax was increased from 2% to 4% (R. 24-25).

The Oklahoma Supreme Court held (R. 66):

> "This being a tax for the privilege of doing business within the State during the year for which the privilege is granted by the State and exercised by the insurance company, as we have held, plaintiff became subject to the increased rate during the license year."

In *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 71 L. Ed. 372, this Court on pages 508 and 509 recognized the similar plight of the foreign insurance company there involved, and then said (p. 509):

> "In the *Greene* case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens."

The passage just quoted from the *Hanover* case unquestionably condemns the increased rate of the Oklahoma

gross premium tax insofar as it is applied to appellant during the license year expiring February 28, 1942. The exaction to that extent is also condemned by the early case of *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. Ed. 342.

But we submit that when the above-quoted passage is considered in the light of the Court's further discussion of the question, a broader view must be taken of the rights guaranteed to the appellant under the Federal Constitution. We refer to the discussion appearing on pages 514 and 515 of the opinion in the *Hanover* case.

Earlier decisions dealing with the power of the State to change and revise its taxing system are there considered, after which Mr. Chief Justice Taft, speaking for the entire Court, said (p. 515):

> "* * *, but the decision in *Southern R. Co.* v. *Greene*, 216 U. S. 400, 54 L. Ed. 536, 30 Sup Ct. Rep. 287, 17 Ann Cas. 1247, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business is not unlimited, and that any attempt in a renewal to vary the terms of the *original* license which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its Federal constitutional rights, cannot be effective" (Italics ours).

The *Shaffer Oil & Refining Company* case, cited on pages 42 and 43 of brief of appellant and hereinabove discussed, follows the rule just quoted.

The laws in question operate each year after appellant receives its annual license and applies a discriminatory tax

each year during the period of business permitted by the State. We contend that such is the case under the former rate of 2% as well as the present rate of 4%, and that appellant is thereby denied the equal protection of the laws.

If that contention of appellant is not sustained, we then contend that appellant is at least denied the equal protection of the laws by subjecting it to the increased rate of the tax.

Respectfully submitted,

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